United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

74-1391

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS ~~BROWN~~ BELL,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, HONORABLE JOHN T. CURTIN, DISTRICT JUDGE.

BRIEF FOR PLAINTIFF-APPELLEE

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INDEX.

TABLE OF CASES.

RULES.

MISCELLANEOUS.

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Issues Presented for Review

1. The District Court was correct in allowing the Government's psychiatrist to testify about the significant factors in the defendant's medical record on which the psychiatrist based his opinion.

2. Was the District Court correct in allowing the prior testimony of Sandra Witmer to be read to the jury.

3. The evidence was sufficient to sustain the jury's guilty verdict.

Statement of Facts

The statement of facts prepared by the defendant is essentially sufficient with the exception of omissions of the limitations placed on Dr. Richard Miller's testimony by the Court.

As soon as Dr. Miller testified that he had reviewed the defendant's prior arrest record, the Court clarified his testimony by pointing out that it was offered with respect to the defendant's mental capacity and intent on the date of the crime (R. p. 197). Prior to Dr. Miller's testimony concerning the basis of his opinion the Court inquired into the necessity for reviewing the defendant's past criminal record (R. ps. 198-209). Dr. Miller informed the Court that his diagnosis of the defendant was related to the defendants' arrest record (R. p. 201, 202). Judge Curtin explained to Dr. Miller the prejudicial nature of direct testimony concerning defendant's prior arrests (R. p. 205) and directed Dr. Miller to make his diagnosis without reference to the defendant's arrest record whenever possible (R. p. 207). Thereafter, Dr. Miller did not refer to the defendant's prior arrest record, even when reading from Henry H. Haines' letter to Dr. Jimmy Holland. When Dr. Miller told the jurors he was omitting two sentences from the letter Judge Curtin instructed the jurors not to speculate about the omitted portion (R. p. 224). Again, prior to cross examination of Dr. Miller, Judge Curtin specifically instructed the jury that although Dr. Miller may have referred to prior conduct on the part of the defendant which was criminal in nature, the jurors could not consider that conduct as indicating a propensity to commit the crime charged (R. p. 239). Judge Curtin further safeguarded the proceedings by declining to allow the defendant's hospital records to be given to the jury.

ARGUMENT

POINT I

The District Court was correct in allowing the Government's psychiatrist to testify about the significant factors in the defendant's medical records on which the psychiatrist based his opinion.

The defendant elected to assert the defense of insanity based on the testimony of Michael Lynch, a well-qualified psychiatrist. The defendant's assertion of that defense not only gave the Government the right to have the defendant examined by a psychiatrist of its own choosing *United States v. Driscoll*, 399 F.2d 135 (2nd Cir. 1968), but also allowed the Government's psychiatrist to testify concerning the basis of his opinion, *United States v. Baird*, 414 F.2d 700 (2nd Cir., 1969) cert denied 396 U.S. 1005 (1970) *United States v. D'Anna*, 450 F.2d 1201 (2nd Cir., 1971), including information derived from hospital records which indicate a history of alcoholism, drug addiction and criminal behavior *United States v. Kohlman*, 469 F.2d 247 (2nd Cir., 1972) *United States v. Trapnell*, Nos. 73-2071 and 74-1018 (2nd Cir., filed April 10, 1974). The defendant's introduction of the hospital records by Dr. Lynch in support of his testimony estopped the defendant from objecting to Dr. Miller's use of those records in support of his opinion *Baird* at 707; *Trapnell*, at 2878; *Fitzgerald v. A. L. Burbank and Co.*, 451 F.2d 670, 682-683 (2nd Cir. 1971).

Kohlman held that where the defense raises the issue of the defendant's prior criminal record and antisocial behavior the Government has the right to delve into those facts on cross examination. The defendant would have the Court believe that it also stands for the corollary proposition that unless the defendant's psychiatrist introduces

evidence of a defendant's arrest record or antisocial behavior the Government's psychiatrist is barred from testifying about those matters where they are part of the basis for his opinion. That contention ignores the fact that psychiatric opinions are a form of expert testimony. In order for a jury to evaluate an opinion it must know the basis. Part of that basis is the past behavior of the defendant. The assertion of the insanity defense of necessity subjects the defendant's prior conduct to review by the jury *Baird* at 704, footnote 4.

Defendant's contention that Dr. Miller's first reference to the defendant's prior arrest record is prejudicial is without merit because the Court immediately told the jury that the testimony was offered only as to the defendant's mental capacity and intent on the date of the alleged offense:

> The Court: The Doctor's testimony is offered as to the mental capacity and the intent of Mr. Bell on October 11, 1973, the date of the alleged offense, the alleged bank robbery, is that right?
> Mr. Cohen: Yes. (R. p. 197)

No prejudice resulted from Dr. Miller's continued testimony because the Court specifically instructed Dr. Miller not to testify about specific arrests and Dr. Miller obeyed that mandate throughout the remainder of his testimony:

> The Court: I would think, Doctor, from what you have told me, if you can make a considered diagnosis here without reference to a prior arrest, I think it should be done in that fashion, and we will attempt to proceed that way. (R. p. 207)

The defendant's contention that Dr. Miller's reading of Mr. Haines' letter was prejudicial is also without merit. That letter formed an integral part of the defendant's

psychiatric history and was a basis for Dr. Miller's expert opinion. Its effect was vitiated by the Court's instruction to the jury that they were not to consider Dr. Miller's testimony of prior criminal conduct as indicating the defendant propensity to commit the crime charged:

> I want to say this to you. As I have already charged you before, you should make up your minds as to whether or not this event occurred as charged from the evidence before you about the events of that particular day. Now, doctors were called to discuss the mental capacity of Mr. Bell on October 11th, whether or not he was laboring under any kind of a mental disease or disability which would incapacitate him, make it impossible for him to have a specific intent to commit the crime charged. Now, Dr. Miller here, during his direct testimony, referred to some prior conduct on the part of the defendant, which was criminal in nature. Now, that is not to be—that testimony you may consider as bearing upon his mental capacity, but you may not consider it in any way as indicating a propensity to commit the crime charged. (R. p. 239)

If the defendant's contention were accepted the jury would have no basis for evaluating the expert psychiatric testimony:

> "The real value of expert testimony in these cases is 'in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in [the] mere expression of a conclusion.'" *United States v. Levy,* 326 F.Supp. 1285, 1297 (D.Conn., 1971) aff'd 449 F.2d 769 (2nd Cir., 1971).

POINT II

The District Court was correct in allowing the prior testimony of Sandra Witmer to be read to the jury.

Where the defendant has had an opportunity to cross examine a witness before a judicial tribunal and the witness is unavailable to testify at the defendant's trial although the Government has acted in good faith to attempt to obtain the witness's attendance at the trial the witness's prior testimony may be read into evidence *Mattox v. United States,* 156 U.S. 237 (1895) *Pointer v. Texas,* 380 U.S. 400 (1965); *California v. Green,* 399 U.S. 149 (1970); *Barber v. Page,* 390 U.S. 719 (1968); *Mancusi v. Stubbs,* 408 U.S. 204 (1972).

Judge Curtin specifically found that because of illness Mrs. Witmer could not testify at the trial (R. p. 281) and permitted the Government to read her testimony in an identification hearing held December 3, 1973, into evidence. At the conclusion of the Government's reading the defendant objected to reading that part of the transcript which contained his cross examination of Mrs. Witmer to the jury (R. p. 290). The finding of unavailability by Judge Curtin was based on a letter from Mrs. Witmer's doctor, Oguz K. Sarac, to the Assistant United States Attorney reporting that Mrs. Witmer would be unable to testify until at least May 1, 1974 (Court exhibit 22).

The defendant contends that since there would come a time when Mrs. Witmer would be able to testify the Court should not have permitted the government to read her prior testimony to the jury *Peterson v. United States,* 344 F.2d 419 (5th Cir., 1965) 29 Am. Jur. 2d, Evidence § 754. *Peterson* is distinguishable from the present case because

the missing witness's testimony was admitted at a trial in which the issue differed from the issue at the trial in which it was given *Peterson* at 424. With respect to the illness of the witness being insufficient to justify the case of her prior testimony the Court based its holding on the premise that the important factor in allowing prior testimony of an absent witness to be read to the jury is the jury's opportunity to evaluate the witness' credibility based upon his demeanor on the stand and the manner in which he gives his testimony *Peterson* at 424, 425. The crucial factor in determining the admissibility of an absent witness's prior testimony is whether or not the defendant had an opportunity to cross examine the witness *California v. Green,* p. 165; *United States ex rel. Stubbs v. Mancusi,* 442 F.2d 561 (2nd Cir., 1971) reversed 408 U.S. 204 (1972); *United States v. Fiore,* 443 F.2d 112 (2nd Cir., 1971) cert. den. 410 U.S. 984 (1973), 3A Wigmore, Evidence Section 1018 ps. 997-998 (Chadbourn revision, 1970). Since the defendant cross examined Mrs. Witmer on the issue of her identification at a prior hearing before the Court, her prior testimony was properly read to the jury.

If the defendant had fully quoted American Jurisprudence he would have included the following:

> "The tendency of the recent criminal cases, moreover, is to permit testimony given at a former trial or at the preliminary hearing to be reproduced when the witness who gave the testimony is too ill to attend Court at the term at which the case is tried." 29 Am.Jur. 2d, Evidence, Section 754, Page 825

The great weight of authority supports the position that if the witness's illness prevents his attendance in Court, his former cross examined testimony should be permitted to be read to the jury 5 Wigmore, Evidence, Section 1406; 3

Wharton, Criminal Evidence, Section 651; Proposed Federal Rules of Evidence, Rule 804(a) (4) at 51 F.R.D. 438:

> "There is no reason why (the degree of a witness's illness) should ever come before a Court of Appeal; to the trial court should be left the determination of the existence of the necessity in a particular case." 5 Wigmore, Evidence Section 1406, Page 159

Even if the Court determines the reading of Mrs. Witmer's prior testimony to the jury was error, that error was not prejudicial. Geraldine Schmidt identified the defendant not only during the trial but also within 15 minutes of the event *United States v. De Sisto,* 329 F.2d 929 (2nd Cir., 1964) cert denied 377 U.S. 979 (1964).

POINT III

The evidence was sufficient to sustain the jury's guilty verdict.

The defendant has asserted that Dr. Miller's expert opinion justifies the conclusion that the defendant lacked criminal responsibility in accordance with the standard established in *Freeman.* That conclusion is not supported by the record. Dr. Miller testified that the defendant's eight year history of psychiatric illness at various times indicated that the defendant suffered from alcoholism (R. ps. 215, 227), was without mental disorder (R. ps. 218, 227), had an antisocial personalty (R. p. 218), was dependent on drugs (R. p. 227), and had a sociopathic personalty (R. p. 227). Dr. Miller diagnosed the defendant as suffering from alcoholism, habituation of drugs, passive dependent character disorder, and sociopathic personalty (R. ps. 232-233). Based on the defendant's history and his own diagnosis Dr. Miller concluded that the defendant did not lack

a substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law (R. p. 233). The reason for that conclusion was: "I say that because neither in my interview with Mr. Bell or anywhere in the records does it show that he does not have the capacity to know right from wrong or to have a clear picture of the consequences of his act." (R. p. 234) Even the defendant's psychiatrist, Michael Lynch, has recognized the fact that an individual with an antisocial personalty can appreciate the wrongfulness of his conduct and conform it to the requirements of law *Kohlman* at 250.

Criminal responsibility is not measured in terms of whether or not an individual adopts his behavior to the standards in the community. If that were "basically" the test, as contended by the defendant, then all criminals would be insane.

The jury was presented with a differing opinion of two qualified experts. It was in their discretion to determine the probative value of the expert testimony and resolve it in favor of Dr. Miller *United States v. Bohle*, 475 F.2d 872, ps. 873, 874 (2nd Cir., 1973).

Conclusion

The testimony of Dr. Miller was properly admitted into evidence and limited by the District Court. The District Court properly exercised its discretion in permitting the prior testimony of Sandra Witmer to be read to the jury. The evidence was sufficient for the jury to find the defendant criminally responsible for attempting to rob the bank.

For the foregoing reason the judgment by the District Court should be affirmed.

Respectfully submitted,

JOHN T. ELFVIN,
United States Attorney for the
Western District of New York,
Attorney for Plaintiff-Appellee.

KENNETH A. COHEN,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Thomas Brown
Docket No. 74-1391

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 14 day of June, 19 74 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

David Brown, Esq.

700 Liberty Bank Building

Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Kenneth A. Cohen, Esq., Assistant U. S. Attorney

502 U. S. Courthouse, Buffalo, New York 14202

Roger J. Grazioplene

Sworn to before me this

14 day of June, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19.75

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appelle

-v-

DOCKET NO. 74-1391

THOMAS BELL,

Defendant-Appellant

ERRATA

1.	Cover	"THOMAS BROWN" should read "THOMAS BELL"
2.	P. 3 2nd ¶	"Kohlman" should read "Kohlman"
3.	P. 5 line 5	"defendant" should read "defendant's"
4.	P. 5 line 22	"accepted the" should read "accepted, the"
5.	P. 7 line 4	"case" should read "use"
6.	P. 7 line 14	"p. 165;" should read "at 165;"

74-1391

B

United States Department of Justice

UNITED STATES ATTORNEY
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ADDRESS REPLY TO
UNITED STATES ATTORNEY
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Kenneth A. Cohen

OUR REFERENCE
KAC:bk
CR 1973-328

June 18, 1974

A. Daniel Fusaro, Clerk
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New York, New York 10007

Re: United States v. Thomas Bell
Docket No. 74-1391

Dear Mr. Fusaro:

We are in receipt of the Government's brief in the above-entitled action as printed by the Batavia Times. Enclosed herewith is an Errata pertaining to that brief.

Very truly yours,

JOHN T. ELFVIN
United States Attorney

Kenneth A. Cohen

BY: KENNETH A. COHEN
Assistant U. S. Attorney

cc: David Brown, Esq.